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No. 87-810

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAIME FLOREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he did not violate the law when he structured a series of currency transactions in an effort to evade federal reporting requirements.

1. Following conditional pleas of guilty in the United States District Court for the Middle District of Florida, petitioner was convicted on five counts of causing the concealment of material facts from the Internal Revenue Service, in violation of 18 U.S.C. 1001 and 2(b). He was sentenced to two consecutive five-year terms of imprisonment, a consecutive five-year term of probation, and a fine of $10,000. In an unpublished judgment order (Pet. App. A1; 820 F.2d 1130 (Table)), the court of appeals affirmed.

Under federal law, a financial institution is required to file a Currency Transaction Report (CTR) whenever a customer makes a currency deposit in excess of $10,000. 31 U.S.C. 5313; 31 C.F.R. 103.22(a)(1985).[1] The facts of

[1] Section 5313(a) (31 U.S.C.) provides in relevant part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the

this case, which are set out in the five counts to which petitioner pleaded guilty, are not in dispute (Pet. 5-6). They show that on single days in April, October, and November 1985, petitioner made currency deposits or used currency to purchase cashier's checks from various branches of three Florida banks. The currency transactions aggregated to more than $10,000 per bank on each individual day, but petitioner structured them so that the banks in question failed to file CTR's for any of the transactions.

Petitioner moved to dismiss the indictment before trial, contending that his structured transactions were not unlawful. The district court denied the motion and, after two days of trial, petitioner entered a conditional guilty plea. Relying on its prior decisions in *United States* v. *Tobon-Builes,* 706 F.2d 1092 (1983), and *United States* v. *Giancola,* 783 F.2d 1549 (1986), cert. denied, No. 86-491 (Dec. 15, 1986), the court of appeals affirmed in an unpublished judgment order (Pet. App. A1; 830 F.2d 1130 (Table)).

Treasury prescribes), in an amount, denomination, or amount and .denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. * * *

Section 103.22(a) (31 C.F.R.) provides in relevant part:

> Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary * * * and all information called for in the forms shall be furnished * * *.

Each Currency Transaction Report form contains the following provision:

> Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

2. Petitioner contends (Pet. 7-10) that this Court should review the government's theory that it is illegal to structure currency transactions so as to avoid the currency reporting requirements. The same claim was before the Court in *Giancola* v. *United States,* No. 86-491, and *Heyman* v. *United States,* No. 86-5365, and in both cases the Court denied certiorari (see *Giancola* v. *United States,* No. 86-491 (Dec. 15, 1986); *Heyman* v. *United States,* No. 86-5365 (Dec. 1, 1986)). In our briefs in opposition in those cases, we noted that there has been some division among the circuits on this and related issues arising from prosecutions under Section 5313.[2] Congress, however, has recently enacted the Money Laundering Control Act of 1986, which is included as Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18. The Money Laundering Control Act was expressly designed to overrule the cases that conflict with the result reached by the court of appeals here. The new law deprives the statutory issue presented in the petition of any continuing significance. Accordingly, petitioner's claim does not warrant further review by this Court.

Under Section 5313 and its accompanying regulations, only financial institutions have a duty to file CTR's in connection with cash transactions. Several courts of appeals have nevertheless recognized that under 18 U.S.C. 2(b) a defendant may still be held criminally liable for causing a financial institution to violate its statutory duties. *United States* v. *Heyman,* 794 F.2d 788 (2d Cir. 1986), cert. denied, No. 86-5365 (Dec. 1, 1986); *United States* v. *Cook,* 745 F.2d 1311, 1314-1316 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Puerto,* 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984);

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[2] We have furnished counsel with copies of our briefs in opposition in the *Giancola* and *Heyman* cases.

United States v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). See also *United States* v. *Thompson*, 603 F.2d 1200 (5th Cir. 1979). Other courts of appeals have taken a contrary view, holding that because Section 5313 and the applicable regulations do not impose on third parties a duty to report, 18 U.S.C. 2(b) cannot impose criminal liability on persons who, by structuring their transactions, cause a financial institution to fail to file a CTR. See, *e.g.*, *United States* v. *Gimbel*, 830 F.2d 621, 624-625 (7th Cir. 1987); *United States* v. *Larson*, 796 F.2d 244 (8th Cir. 1986); *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985).

Whatever the merit of the latter decisions in construing Section 5313, Congress has totally revised the law in this area by enacting the Money Laundering Control Act of 1986. The explicit purpose of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the Eleventh Circuit's decision in *Tobon-Builes*—on which the same court relied in the present case. Section 1354 of the Act, entitled "Structuring Transactions to Evade Reporting Requirements Prohibited," creates a new section of Title 31 (Section 5324), which provides as follows:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR as well as for structuring deposits, as petitioner did here, for the purpose of evading the reporting requirements of Section 5313. In formalizing these statutory obligations, Congress made clear that its purpose was to overrule the First and Ninth Circuit decisions in *United States* v. *Anzalone, supra*, and *United States* v. *Varbel, supra*. The Senate Committee on the Judiciary, reporting favorably on an identical provision in S. 2683, 99th Cong., 2d Sess. (1986), an earlier version of the money laundering bill, stated (S. Rep. 99-433, 99th Cong., 2d Sess. 21-22 (1986)):

> Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and section 1001 (concealing from the Government a material fact by a trick, scheme, or device). For example, in *United States* v. *Tobon-Builes,* 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had structured a series of currency transactions, each one less than $10,000 but totaling more than $10,000, to evade the reporting requirements. * * * In contrast, the First Circuit Court of Appeals, in *United States* v. *Anzalone,* 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States* v. *Varbel,* 780 F.2d 758 (9th Cir. 1986) have held that structuring currency trans-

actions to avoid the reporting requirements did not violate 18 U.S.C. section 1001.

Subsection (h) would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone, Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

The House intended precisely the same results when it formulated a virtually identical version of the money laundering provisions. The Committee on Banking, Finance and Urban Affairs stated (H.R. Rep. 99-746, 99th Cong., 2d Sess. 18-19 (1986) (footnote omitted)):

> In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the government a material fact by a trick, scheme, or device).
>
> In contrast, other cases have held that the Act and its regulations impose no duty on the customer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements.[3]

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[3] For this proposition the House Report cited, inter alia, *Anzalone* and *Varbel* (H.R. Rep. 99-746, *supra*, at 19 n.2).

> The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various circuit courts by expressly subjecting to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

In light of this new legislation, there is no reason to expect that the previous conflict among the circuits will persist. Accordingly, review by this Court is unwarranted.

3. In any event, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act.

The court of appeals did not address in this case the underlying question whether a third party who causes a bank to breach its reporting obligations may be held liable under Section 5313, having resolved that issue in its earlier decision in *Tobon-Builes*. There, the court of appeals had held that although the duty to file CTR's is imposed only on financial institutions, a third party who causes the institution to violate its duties may be convicted under 18 U.S.C. 2(b).[4] That holding comports with the broad language of Section 2(b), which extends liability to anyone who "causes an act to be done which if directly performed by him or another would be an offense against the United

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[4] Correspondingly, a third party who conspires to cause a bank to violate its reporting obligations may be convicted under 18 U.S.C. 371. See *United States* v. *Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Lester*, 363 F.2d 68, 73-74 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

States." As the reviser's note to 18 U.S.C. 2 states, the aiding and abetting statute

> removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[5]

That construction of Section 2(b) applies here as well. Although petitioner's structured deposits prevented various banks from learning of their duty to file CTR's, his success in that endeavor cannot shield him from liability under Section 2(b).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[5] The reviser's note also indicates that Section 2 was intended to embrace this Court's decision in *United States* v. *Giles*, 300 U.S. 41, 43 (1937). There, the Court upheld the conviction of a bank teller under a statute that prohibited bank employees from "*mak[ing]* any false entry in any book * * * of such Federal reserve bank or member bank." The defendant was convicted of having caused a bookkeeper for the bank to make false deposit entries in the bank's ledger, by wrongfully withholding from circulation certain deposit slips prepared for particular bank customers. Although the defendant had not himself made the false entries, and although the "innocent bookkeeper was the teller's * * * unconscious agent," the Court held that "the statute [was] broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows" (*id.* at 48-49). So, too, for Section 2(b): it applies even where the defendant, by his actions, causes an innocent intermediary unwittingly to violate the law. Accord *United States* v. *Ruffin*, 613 F.2d 408, 412-413 (2d Cir. 1979); *United States* v. *Catena*, 500 F.2d 1319, 1322-1323 (3d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine*, 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

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